



The Employment Rights Bill

Commentary from the Farrar's Building Employment Team
October 2024

*"A first class set ... who will
always go the extra mile to
assist"*

(Chambers & Partners)

The Employment Rights Bill

Before the election Labour announced that they were committed to “Securonomics”. The term was intended to encapsulate giving working people security in their day-to-day lives. Labour promised to set out employment law reforms - a “New Deal for Working People”- within the first 100 days of Government. Today, at 11am and within those first 100 days, the Employment Rights Bill (ERB) was presented. The ERB makes 28 different proposals over 150 pages. This note analyses the most significant of those proposals and how they stack up against Labour’s manifesto pledges.

1. Unfair Dismissal:

Promised: Right not to be unfairly dismissed from day one coupled with the employer’s right to operate a limited probationary period.

ERB: Unfair dismissal as a day one right, with a probationary period fixed by the Secretary of State, understood to be 9 months. In effect therefore, employees do not seem to have gained a general right against unfair dismissal right from day one. It is worth noting that employees already have the right not to be unfairly dismissed for automatically unfair reasons, or for a discriminatory reason.

2. Parental and Paternity Leave & Sick Pay:

Promised: Right to parental and paternity leave from day one of employment as well as sick pay on first day of illness.

ERB: As promised, although sick pay may be reduced for some if they earn low wages. Bereavement leave has also been slightly expanded.

3. Flexible Work

Promised: The right to work flexibly will be a day one right.

ERB: Provides for a day one right to request flexible working. This can only be refused on one of the prescribed grounds already in the ERA **and** where it is reasonable for the employer to refuse on that/those grounds (previously there was no requirement for the rejection to be reasonable).

An employer may refuse a request if it thinks there would be: a) a detrimental impact on customers; b) additional costs; c) inability to reorganise work among existing staff or recruit additional staff; d) a detrimental impact on quality or performance; or e) planned structural changes to the business. The reference to refusal having to be “reasonable” will probably spawn a significant amount of litigation both in the short term while test cases go through the tribunal, and there is a rush of employees making these requests.

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However, the exceptions are very broad. Further, it is likely that tribunals will be directed to pay considerable deference to an employer's assessment of their own business needs (as, for example, they already do when assessing whether there is a need to make redundancies). We would expect that in the long term a claim for unreasonable refusal of a flexible working request would be easy for an employer to defend.

4. Fire & Re-hire

Promised: Fire and re-hire to be abolished. Businesses to be able to restructure in order to remain viable, if genuinely no alternative, but by following a proper process, with effective remedies against abuse.

ERB: This is addressed by way of introducing a new basis for claiming automatically unfair dismissal; namely where the reason (or principal reason) for the dismissal is that the employee did not agree to a proposed variation of contract or if they were dismissed in order to allow the employer to employ someone else (or re-engage the same employee) under a varied contract, to carry out substantially the same duties. However, the proposals have been softened from what might have been expected as it will be a defence for the employer can show that the variation was an attempt to mitigate financial difficulties which were likely to affect its ability to carry on the business.

Plainly this will provide fertile ground for dispute on definitions and applications. We would speculate that the requirement to make a *"guaranteed hours"* offer is likely to be made along with a wider number of contractual variation proposals and restructuring, giving rise to fire-and-rehire litigation.

5. Zero-Hour Contracts

Promised: Banning zero-hour contracts. Giving workers the right to a contract that reflects the number of hours they regularly work over a twelve-week reference period. Reasonable notice of any change or cancellation and compensation.

ERB: Sets out a requirement that employers to make a *"guaranteed hours offer"* to workers after the end of every period. A guaranteed hours offer will guarantee not only minimum hours but also a working pattern of which days and times a worker will be offered work. The mechanics of the new right to guaranteed hours, is set out over 8 sections (the last three concerned with claims, time limits and remedies). The whole issue takes up 27 pages...it is complicated stuff!

There then follows provisions setting out the right to reasonable notice of a shift, a cancellation or a change of shift. There will be right to compensation where a shift is cancelled without reasonable notice.

The ERB will also establish a new enforcement agency, the Fair Work Agency, which will have jurisdiction to enforce rights, such as holiday pay, but will also be able to *"support employers looking for guidance on how to comply with the law"*.

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6. Additional Protections Against Harassment

Promised: Additional protections against harassment in the workplace, including protection from harassment by third parties.

ERB: The last government already introduced a duty to take reasonable steps to prevent sexual harassment by virtue of the Worker Protection (Amendment of Equality Act 2010) Act 2023. They will now have a duty to take “all” reasonable steps. This is a marginal change and, in any event, proving the duty has been breached will only cause an uplift in damages where an employee has already proved they suffered harassment under the existing law.

More substantial is a duty on employers to prevent harassment by people who are not their employees or the employer themselves (third parties). Employees or workers may claim if they are harassed by a third party and the employer had not taken all reasonable steps to prevent harassment. Potentially this is a huge expansion of the right against harassment, and we anticipate will cause a great deal of litigation in the retail, hospitality and healthcare sectors.

7. Unions

Promised: Labour will strengthen trade unions.

ERB: These changes are technical and will doubtless fill many longer papers, suffice to say unions appear to have new rights to access the workplace, lower percentage thresholds before they will be recognised, and union representatives in the workplace will have some additional rights to facilities and time off. There will no longer be a requirement for 50% turnout of eligible ballots to call a strike and various other requirements for a successful industrial ballot have been removed.

8. Single Enforcement Body

Promised: Implement earlier consultations which suggested that there should be a single state enforcement body for certain basic employment rights.

ERB: The Secretary of State will now have an enforcement function in relation to enforcing a few basic employment laws - including the National Minimum Wage Act 1998, Modern Slavery Act 2015 and Working Time Regulations 1998. Effectively, this will involve the creation of a new market regulator with investigatory powers akin to the powers the Gangmasters Authority and Labour Abuse already has. Details of how the structure of this enforcement body will be published in subsequent delegated legislation. At first glance this looks like a change in the balance of power in the employment market, where (with a few exceptions) it has been left to unions and individuals to enforce employment law.

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However, it is worth noting that the bulk of individual employment rights- all the rights contained within the Employment Rights Act 1993 and The Equality Act- will not be matters for enforcement by this new regulator. Therefore, this may transpire to be little more than a consolidation of the existing regulatory functions of HMRC and the GLAA to deal more efficiently with employers who repeatedly break existing law.

What else is there?

While it is not possible to be exhaustive in this summary, the ERB also contains provisions for public sector pay for adult social care and school support staff, a new duty for employers to publish equality action plans and tip policies and changes on redundancy consultation. There is an expansion of the duties in relation to redundancy consultations (the "one establishment" test is now abolished which will mean more businesses are caught by the various consultation requirements). There are further detailed changes for the rules on redundancy for ship's crew and maritime workers which seem designed to avoid a repeat of the P&O scandal.

What's Missing?

Some manifesto commitments are noticeably absent from the ERB. The Government has also, today, published a "Next Steps" document, which will outline future plans for meeting these commitments, including:

Employment Status: The manifesto promised to move from a 3 tier system of rights whereby we have employees, workers and self-employed people to a 2 tier system. Provisions for this have not appeared in the bill although rights for workers have been strengthened.

Right to Disconnect: Introducing a right to switch off, outside of working hours (akin to Belgium, Ireland and France).

Whilst employees will welcome the fact that key promises having been replicated in the draft legislation, there will now be a lengthy period of consultation and, following that, the final draft is unlikely to become law until 2026/2027. The rowing back on abolishing fire and rehire suggests that some movement to placate employers is possible. Watch this space!

DISCLAIMER: *This is a 150 page bill and it will take a while for employers, unions and lawyers to map the full implications of the proposals. Further it may be subject to amendment during the legislative process. This note should not be used as a substitute for legal advice and is not intended as such. Farrar's building and its members accept no liability for the accuracy of this note.*



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